No. 79-794

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

ROBERT A. deVITO, M.D., Director
Illinois Department of Mental Health
& Developmental Disabilities,

Petitioner,

v.

JULIUS LANG, Conservator of DONALD LANG,

Respondent.

MEMORANDUM

OPPOSING

CERTIORARI

EPSTEIN AND KESSELMAN

BY: MARK B. EPSTEIN

Attorneys for JULIUS LANG,
Conservator of DONALD LANG,
Incompetent.

134 N. LaSalle Street
Suite 2004
Chicago, Illinois 60602
312/782-3193

IRWIN M. KESSELMAN

Of Counsel

INDEX

CORRECTION OF PETITIONER'S TYPOGRAPHICAL ERROR

A typographical error occurred on page six of Petitioner's brief. Lines one through five of page six read:

> Present Illinois law does not permit commitment of a person unfit in the statutory sense who has demonstrated violent behavior in the past but who is mentally retarded or suffering from a mental disorder.

Lines one through five should read:

> Present Illinois law does not permit commitment of a person unfit in the statutory sense who has demonstrated violent behavior in the past but who is not mentally retarded or suffering from a mental disorder. (Emphasis added.)

STATEMENT OF THE CASE

A. Donald Lang is in need of mental treatment, but not, in the legal sense, "in need of mental treatment"

Petitioner's Statement of the Case needs some clarification. Petitioner states at p.5:

> A hearing was held on December 8, 1976, in which the trial judge determined that although Lang had clearly manifested dangerous behavior, he was not in need of mental treatment and not mentally retarded...

Petitioner's phrase "in need of mental treatment" should actually read "'in need of mental treatment'". The phrase "in need of mental treatment" as used in Illinois is a euphemism for saying that a person has been deemed legally involuntarily committable. Thus Donald Lang was a person actually in need of mental treatment, but he was not a person found to be legally

"in need of mental treatment". Thus, the Petitioner correctly quotes the trial court (Judge Joseph Schneider) as saying:

> In Lang's case we have a person who is unfit to stand trial because of a combined physical and mental condition.... [Petitioner's brief p.5.]

This euphemistic problem has been resolved by recent Illinois legislation which has done away with the term of art "person in need of mental treatment" and has substituted the more correct term "person subject to involuntary admission." Compare Ill.Rev.Stat. ch. 91-1/2 §1-11 (repealed 1979) with the provision substituted for it, namely Ill.Rev.Stat. ch. 91-1/2 §1-119 (1979), at Petitioner's brief p.3.

This distinction is significant.

Even though Donald Lang did not have a clearly diagnosable mental disorder, and was therefore not involuntarily committable, he did have a mental condition.

B. The background of the Conservator's actions

At pp.6-7 of Petitioner's brief Petitioner correctly states that the Conservator objected to Lang's discharge from the Illinois Department of Mental Health and Developmental Disabilities (DMHDD), and that the Conservator appealed the Appellate Court's reversal of the trial court's Writ of Mandamus. The Petitioner's brief, however, does not adequately explain the background for the Conservator's actions.

It is clear that Donald Lang is educable. It is clear that he

can learn to communicate. It is estimated that if properly housed and trained he could learn to engage in normal conversation -- sufficient to stand trial -- in three to five years.

It is also clear that Lang did not exhibit his potential for learning communication until DMHDD designed and implemented a program for him, using its facilities and its good offices. See trial court's opinion December 8, 1976, Petitioner's brief p.App.22.

The following excerpts give a picture of Lang's potential:

> The defendant is a deaf-mute who cannot hear or speak, was never taught to read or write or to use sign-language, and is unable to communicate with anyone in any language

system. [People v. Lang, 37 Ill.2d 75, 224 N.E.2d 838, 839 (1967).]

Dr. Donoghue stated that he is positive that Lang has the ability to make up his social and educational deficits.... Dr. Donoghue testified that Lang does not have a permanent communication deficit and that given time and training under the appropriate surroundings Lang could engage in normal conversation in three to five years. [Trial court's opinion, December 8, 1976, Petitioner's brief p.App.6-7.]

Based on her observations Ms. Haight stated that Lang had learned sign language faster than anyone she had ever taught before. [Trial court's opinion, December 8, 1976, Petitioner's brief p.App.10.]

Other observations of Lang by Mr. LaBon were that Lang followed the rules of various games that were played once they were communicated to him...." [Trial court's opinion, December 8, 1976, Petitioner's brief p.App.9.]

Donald Lang is clearly educable. What is the responsibility of DMHDD to help educate him?

Dr. Edward Page-El, a qualified expert neurologist, and an employee of DMHDD, testified at Lang's October 1976 committment hearing. He stated that in his opinion Lang was not mentally retarded. The trial court asked if Dr. Page-El had a recommendation for a program that would help a person like Lang. He replied:

> Yes. There is a recommendation. The recommendation is that he be placed in a learning situation for intensive signing courses -- signing, learning to communicate with his hands and an educational program in conjunction with a work program for adaptive living subsequent.
>
> The fact that I feel that he is not retarded does not disqualify him from receiving assistance from the Department of Mental Health. And he doesn't have developmental disabilities, but he has a neurological impairment

> that occurred at an early age, and it is suspected to be permanent.
>
> And even the absence right now of retardation, his disability fits into the classification of developmental disability because it requires the same type of treatment modalities.
>
> This is outlined in Public Law... [Trial court's opinion, October 3, 1977, Petitioner's brief p.App.34.]

Dr. Page-El's diagnosis -- "A neurological impairment that occurred at an early age, and is suspected to be permanent" -- places Lang's handicap directly within the treatment competence of DMHDD. The Department's title was amended in 1974 from "The Department of Mental Health" to "The Department of Mental Health and Developmental Disabilities," Illinois Mental Health Code §1-2 (1975), Ill.Rev.Stat. ch. 91-1/2 §1-2. Who is "developmentally disabled" for the purposes of qualifying for treatment by DMHDD?

> "Developmentally disabled" means individuals whose disability is attributable to mental retardation, cerebral palsy, epilepsy or other neurological condition which generally originates before such individuals attain age 18 which had continued or can be expected to continue indefinitely and which constitutes a substantial handicap to such individuals. [Ill.Rev.Stat. ch.91-1/2 §601.03, emphasis added.]

Accordingly, a person with Lang's diagnosis is suitable for treatment by DMHDD. On March 9, 1977, Dr. Robert Donoghue, an expert upon whom the trial court relied heavily in its December 8, 1976, opinion, stated in testimony (through a sign-language interpreter):

> I am praying now that maybe DMH will be a little bit more flexible in their attitude and that maybe Donald will find part-time home at ISPI. That is most important thing now, that I see it. Find him a place where he can be safe and have a chance to start organizational living.

> I am pretty sure that the Siegal Institute through tutoring of Miss Haight can do a good job in teaching language to him, and I am sure that some kind of work program can be developed, but the question where we put Donald, where we have security and the friends he has developed is what is bothering me now. [Transcript, March 9, 1977, at p.15.]

On a related issue in a different case, the Illinois Supreme Court recently stated:

> A high value has also been placed...on our society's obligation to protect and care for those of its members unable to protect or care for themselves. It is important to a concerned and humane society that the margin of error be held to a minimum in denying such protection and care. Moreover, the individual involved, as well as society, has a strong interest in getting needed care or treatment which will enable him to function normally, and it seems to us that neither the interests of society nor the mentally ill are well served by a standard requiring proof so conclusive that many persons will be denied

> needed treatment, care and protection. [In re Stephenson, 67 Ill.2d 544, 367 N.E.2d 1273, 1276-77 (1977).]

We have considered Lang's pending criminal charges, his educability, and DMHDD's capacity and duty to treat handicaps like Lang's handicaps. In light of these the Illinois Supreme Court ordered that Lang be re-heard with regard to his involuntary admissability to DMHDD. If he is found involuntarily admissable, he will be so admitted. If he is found not involuntarily admissable, then:

> ...the court may release him on bail. However, in doing so it should specify conditions of bail, under Section 5-2-2(a) of the Unified Code of Corrections (Ill.Rev.Stat. 1977, ch.38, §1005-2-2(a)) which prescribe appropriate treatment by the Department of Mental Health and Developmental Disabilities in an attempt to establish Lang's fitness to be tried. [People v. Lang,

_____Ill.2d_____(1979), 391 N.E.2d 350, 358, emphasis supplied, See Petitioner's brief pp.App.89-90.]

Under either circumstance Lang will be treated by DMHDD. That is the relief which the Conservator sought and that is the relief which the Illinois Supreme Court granted. All other issues are tangential. No other issue concerns the Conservator. No other issue rises to the level of a case or controversy.

NO FEDERAL QUESTION IS PRESENTED AND THE DIRECTOR DOES NOT HAVE STANDING

Petitioner argues that a federal question is presented because the Illinois Supreme Court's opinion threatens the Constitutional rights of potential involuntary admittees and that the Director has standing to champion those rights.

Petitioner's argument strains both logic and experience. The only right that the Director has thus far championed is the right to shirk his duty to help care for Donald Lang, whether Lang be an in-patient or an out-patient, whether he be admitted involuntarily or voluntarily or as a condition of bail. The only "substantial relationship" the Director has had to Donald Lang is to try

and keep him off the debit side of the Department's fiscal balance sheet.

Donald Lang's Constitutional rights are best protected by him, in his own words, after -- hopefully -- he has been adequately trained, with the help of DMHDD, to express those rights by and for himself.

Short of Donald Lang asserting by himself his own Constitutional rights, those rights have been and will continue to be asserted by his duly appointed representatives and attorneys. With all due respect, considering this law suit, and its companion suit, it cannot be said that Donald Lang's rights have thus far gone unasserted. Donald Lang does not now need the Director to champion his right to remain an illiterate deaf-mute.

LANG WAS NOT DENIED EQUAL PROTECTION OR DUE PROCESS; FOR, THE ILLINOIS SUPREME COURT DID NOT EQUATE UNFITNESS WITH MENTAL ILLNESS

The Petitioner distorts the Illinois Supreme Court's opinion and states:

> The State will solely be required to prove by clear and convincing evidence that the defendant is dangerous to himself or others. If the burden is successfully borne by the State, the unfit defendant will be committed. The issue of the presence of a mental illness will never be addressed in the commitment proceedings. [Petitioner's brief p.15.]

On the contrary, the Court stated:

> ...if a person is found unfit to stand trial, he should be considered to be mentally ill under the MHDD Code unless his unfitness is due to a solely physical condition. [People v. Lang, ____Ill.2d ____(1979), 391 N.E.2d 350,356, Petitioner's brief p.App.85.]

If a defendant, though so disabled as to be unfit to stand trial, is found to be unfit solely because of a physical disability, he will not be involuntarily admissable even if he is dangerous. Accordingly, in addition to finding dangerousness, the trial court must find (1) that the subject has been declared unfit to stand trial, (2) that the disability which is the cause of the unfitness is not a solely physical disability, and (3) that the dangerousness is caused by the disability. It is not unreasonable to classify someone, who is so disabled so as to be unfit to stand trial, as mentally ill when it has also been found that the disability which is the cause of the unfitness is not solely a physical disability.

And, when that disability is the cause of his dangerousness, it is not unreasonable to subject that person to involuntary commitment. This is particularly so when the person may need treatment or habilitation from the Department of Mental Health and Developmental Disabilities and when the Department is competent to provide that help.

In any case, if there are limitations to be placed upon the theoretical implications of the decision of the Illinois Supreme Court, it is best to leave those limitations to be imposed by the Illinois courts themselves, in the first instance. Not a single case has thus far been decided following the rulings of People v. Lang. How the theory will be applied in actual

practice is something that is at this time mere speculation.

CONCLUSION

Because there is no Federal Question, and because the Petitioner has no Standing, and also because there is no Case or Controversy with regard to the issues which the Petitioner has argued, and because the issues argued by the Petitioner have no substantive merit, and because, if they do have merit in theory, a determination by this Court should await application of the theory by the state courts, a Writ of Certiorari should not issue.

Respectfully submitted,

EPSTEIN AND KESSELMAN

Mark B. Epstein

By: Mark B. Epstein

Attorneys for Julius Lang,
Conservator of the Person
of DONALD LANG,
134 N. LaSalle Street
Suite 2004
Chicago, Illinois 60602
312,782-3193

Irwin M. Kesselman

Of Counsel